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No. 90-6113

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

RANDALL D. WHITE,
Petitioner,

v.

ILLINOIS,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, Fourth Judicial District

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BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the Confrontation Clause requires that the hearsay statements of a non-testifying complaining witness in a sexual abuse prosecution should be admitted against the accused only upon a case-specific finding of necessity.

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BRIEF FOR PETITIONER

OPINIONS AND JUDGMENTS BELOW

Certiorari was granted to review the decision of the Illinois Appellate Court, Fourth Judicial District in *People v. White*, 198 Ill. App. 3d 641, 555 N.E.2d 1241 (4th Dist. 1990), reprinted at pages 19-55 of the Joint Appendix. The order of the Illinois Supreme Court denying leave to appeal is reprinted at page 56 of the Joint Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides, in pertinent part, that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

The Fourteenth Amendment provides, in pertinent part, that:

> No State shall . . . deprive any person of life, liberty or property without due process of law . . .

STATEMENT OF THE CASE

A. Introduction

The defendant was charged with the aggravated criminal sexual assault of S.G., as well as the related offenses of unlawful restraint and residential burglary.[1] The five-year-old complaining witness did not testify at trial. Instead, the prosecutor was allowed to introduce S.G.'s out-of-court declarations through the testimony of hearsay witnesses.

Following the admission of the hearsay testimony, S.G. was brought to the courtroom for the purpose of testifying, but did not take the stand. (J.A. 10-12) Defense counsel noted for the record that:

> [L]ate yesterday afternoon the alleged victim in this case [S.G.] was presented to the jury in the arms of a man who, ostensibly [sic] the father of the child. She did not testify allegedly because of emotional hiatus of some sort.
>
> (J.A. 14)

Defense counsel moved for a mistrial, arguing that S.G.'s "presence, failure to testify, and exhibition" before the jury denied the defendant a fair trial. (J.A. 14)

---

[1] The residential burglary charge alleged the illegal entry into a dwelling "with the intent to commit therein the offense of unlawful restraint" in violation of Ill.Rev.Stat., 1987, Ch. 38, § 19-3(a).

The motion was denied (J.A. 15), and the jury subsequently found the defendant guilty of the offenses charged. (Vol. VII, R. 65)

On appeal, the defendant contended that he was denied his Sixth Amendment right to confront his accuser where the prosecution relied upon hearsay testimony and neither produced the declarant for cross-examination nor established that she was unavailable to testify. In rejecting the defendant's claim, the Illinois Appellate Court held that the question of unavailability "is totally irrelevant to the determination of whether an out-of-court statement of that declarant is admissible under an exception or exemption to the hearsay rule." (J.A. 42)

B. The Hearsay Testimony

S.G.'s out-of-court declarations were related by her mother and four other witnesses. Tammy Grigsby is S.G.'s mother. (Vol. VI, R. 64) Grigsby and the defendant had dated on many occasions between September, 1987 and April, 1988. (Vol. VI, R. 66, 88-91) The defendant was often a guest at the Grigsby residence. (Vol. VI, R. 88) According to Grigsby, they broke off their relationship around the first of April, 1988, because the defendant told her "that he wanted to start seeing other people, so we did." (Vol. VI, R. 89) They subsequently went out together on April 12, 1988. (Vol. VI, R. 90)

Three nights later on April 15, 1988, fourteen-year-old Tony DeVore was babysitting for S.G. and S.G.'s three-year-old brother Eric at the Grigsby residence. (Vol. VI, R. 8) After putting the children to bed in their mother's bedroom, DeVore fell asleep on the livingroom couch. (Vol. VI, R. 9-10) Devore was subsequently awakened by a scream at four in the morning. (Vol. VI, R. 10, 26) She proceeded upstairs and observed the defendant exiting the bedroom. (Vol. VI, R. 11) The defendant informed

her that S.G. "woke up screaming." (Vol. VI, R. 11-12) The defendant then left the residence. (Vol. VI, R.12)

DeVore knew the defendant because "at one time" he had been a friend of S.G.'s mother. (Vol. VI, R. 27) DeVore continued her testimony by stating that she asked S.G. what happened, and S.G. told her. (Vol. VI, R. 12) Defense counsel interposed a hearsay objection. (Vol. VI, R. 13) The court overruled the objection on the ground that S.G.'s out-of-court statements were admissible under spontaneous declaration exception to the hearsay rule. (Vol. VI, R. 15)

DeVore continued her testimony as follows:

> Q. Okay, what did [S.G.] say at that point?
>
> A. When I went in there she said he put his hand over her mouth. He had been choking her. And she told me that he was touching her in the wrong places and he also said that if she screamed then he would whip her and then call me up there to whip her.
>
> Q. Okay. Now, as best you recall, what did [S.G.] say he or did she identify the person or what?
>
> A. She said—well, first she said his name, Randy.
>
> Q. Okay.
>
> A. And then she went on with he.
>
> Q. Okay. Start with Randy?
>
> A. Yeah.
>
> Q. Okay. Now, you said—you testified that she said he toucher her in wrong places. How did she phrase that as best you recall?
>
> A. She said—she said, "He was touching me." And when I asked where she point[ed] to her private places.
>
> Q. Okay. And [I] ask you could you prescribe where she pointed?
>
> A. To the lower part of her body.

> Q. Okay. And—
>
> [The defendant's continuing hearsay objection was overruled.]
>
> Q. Do you know the name for the portion of the anatomy for what you talked about?
>
> A. Yes, I do.
>
> Q. What was she pointing to?
>
> A. The vaginal area.
>
> (Vol. VI, R. 12-17)

DeVore testified that after she consoled S.G., "she finally calmed down and she quit crying a little bit." (Vol. VI, R. 17)

Tammy Grigsby arrived home about 30 minutes later. (Vol. VI, R. 17-19, 28) At that time, S.G. "wasn't crying or anything" (Vol. VI, R. 77), but appeared "scared" and a "little hyper." (Vol. VI, R. 77-78) Grigsby explained:

> Q. How did she appear emotionally and physically?
>
> A. She was worried that I was going to be mad at her.
>
> (Vol. VI, R. 78)

Grigsby further testified that she told S.G., "Honey you got to tell me what happened." (Vol. VI, R. 77) Grigsby continued her testimony, over defense objection, as follows:

> A. She said she woke up and that Randy was in the room. And that he had put his hand on her mouth and told her that if she screamed that he would, you know, whip her, and Tony would whip her too. And then she said that he put his mouth on her front part.
>
> (Vol. VI, R. 79)

Grigsby stated that she examined S.G. and noticed some "bruises or red marks" on her neck. (Vol. VI, R. 81) Grigsby also noticed that S.G.'s "front part" was "a little red." (Vol. VI, R. 81)

Officer Terry Lewis arrived at 4:47 a.m. (Vol. VI, R. 107) Officer Lewis described S.G.'s condition as follows:

> Q. Could you describe [S.G.'s] appearance emotionally, physically when you were talking to her in the kitchen?
>
> A. At first she was very cooperative. Talkative. Somewhat timid.
>
> Q. Uh-huh. Did she appear upset at that time?
>
> A. Yes, she did.
>
> Q. Could you describe in what way what made you believe she was upset?
>
> A. Just kind of nervous. She was willing to talk to me, but she has some reservations and that type of thing.
>
> Q. Was she using words like reservations or like that?
>
> A. No, no, she was just—to me you know as she was just uneasy, but after talking, you know, getting her at ease. We talked about unrelated things at which got her at ease. We discussed different cartoons that we had in common.
>
> Q. Okay.
>
> A. Things like that and she was like—after that she was very talkative very cooperative.
>
> (Vol. VI, R. 109-10)

After putting S.G. at ease, Officer Lewis questioned her regarding the incident. (Vol. VI, R. 110) Officer Lewis continued his testimony, over defense objection, as follows:

> Q. What if anything did she tell you after you got past talking about the cartoons?
>
> A. She then told me that she had been asleep in her mom's bed with her brother. And that she woke up. She was awakened. And she started screaming. And she was scared. And she said there was a man there that she identified as Randy.
>
> Q. What did—what did she say happened then if she said anything?
>
> A. Well then I asked her what happened. And she told me that Randy had woke her up and it scared her and she started screaming and that he had put his hand on her mouth and she described it as choking her, which I did see some marks on her face.
>
> Q. Back to that in a minute. Could you go on with what she said then?
>
> A. Okay. Okay. Then she said that Randy told her to keep quiet, because if she didn't he was going to whip her. And that he would also tell the babysitter and have Tony whip her also.
>
> Q. Okay. What did she say if anything happened then?
>
> A. She went on and she started talking about her pants being wet.
>
> Q. Okay.
>
> A. And when I referred to them as pants, she advised me they were not pants they were underwear. And that they were wet. I asked if she had peed in her pants and she got disgusted with me she said, "I don't pee in my pants, my underwear" she said.
>
> Q. Uh-huh.
>
> A. And she said Randy done it. So I asked her then I said how did Randy make them wet. And she told me that he had pulled her pants to one side and

used his tongue on her private parts, what she called her private parts.

(Vol. VI, R. 110-12)

Officer Lewis further testified that he noticed some scratches on S.G.'s neck. (Vol. VI, R. 112-13) S.G. advised him that the scratches had been inflicted by the defendant. (Vol. VI, R. 113)

Cheryl Reents, an emergency room nurse, testified that she interviewed S.G. at 8:00 a.m. Ms. Reents described S.G.'s condition as follows:

Q. Okay. And could you describe her emotional or physical condition as best you recall it when you were talking to her in room nine alone?

A. She was cooperative. She put her eyes down at first and seemed—she was twisting her ID band around her wrist. I remember that she was looking down and after that she did answer for me.

(Vol. VII, R. 9-10)

Nurse Reents testified that she then asked S.G. "what happened" and she "just kept asking her what happened then, what happened." (Vol. VII, R. 10) In response to defense counsel's hearsay objection, the prosecutor argued the testimony was admissible as both a spontaneous declaration and "as a statement made for medical purposes to be turned over to the physician for treatment diagnosis." (Vol. VII, R. 10) The objection was overruled and Nurse Reents was allowed to continue her testimony as follows:

A. Okay. As I stated, patient was asked by myself what happened. And she said she was sleeping. And I asked how she was awakened.

Q. Uh-huh.

A. And she said Randy came in. Then I asked her what happened then. That's when she looked down and was turning the I.D. band around on her wrist.

Q. Okay.

A. And let's see [S.G.] said, "He put his hand on my mouth and on my neck."

Q. Okay. What did you do at that point?

A. Okay. Then I asked if he touched her anywhere else. And she said yes. And I asked her where. And she said, "Oh my front part." And then for clarification I asked her to point where. And the patient pointed to the mons area.

Q. Okay. And that's what?

A. That's the genital, the labia majora and the surrounding tissue in the genital area.

Q. On the female?

A. Yes, on the female. Okay. And I—then I, for more clarification, I asked her what he touched her with. And she stated his mouth. And then I asked her if he touched her with anything else. She said no. Then I asked her if he touched her with his front part and she stated no. I asked her if he touched her back—herback part. And she said no. And then I asked her if he made her touch him. She said no. Then I asked her if he made her put her mouth anywhere. She said no. And then I asked if anything was put inside of her. She said no. And I asked if it had ever happened before and she said yes when it was cold out.

Q. Okay.

A. And then she continued to say that he put his mouth on her, but he didn't hurt her that time.

(Vol. VII, R. 10-12)

Dr. Michael Meinzen examined S.G. about twenty minutes later when she was "calm and comfortable." (Vol. VI, R. 47) Dr. Meinzen continued his testimony, over defense objection, as follows:

A. What did she tell me, okay. She—after what she'd—she said she was sleeping. And then what

happened. And she said that I believe at first she just said he touched me or he was on me. And we asked who. She mentioned the name Randy. And at that point, you know, we asked her to direct attention to what—where was it that she touched. She said he put his hands over her mouth and on her neck. And asked what else happened. And she said that he put his mouth down there. We tried to get to be more specific. And asked her to point and touch where exactly he had placed his mouth. And she pointed in the—in the area of her external genitalia.

Q. All right.

A. At that point asked her was she hurt anywhere. And she didn't state that she was in any pain at that particular time. She was rubbing an area on her neck that initially then we directed her attention elsewhere and she didn't seem to be holding that area too much more. Specific questions then that we asked was she hurting anywhere in her genital area. And breaking it down you know into children's terms pointing and asking her specifically where she pee-pee and where she pointed was she hurting anywhere there. And she said no that she wasn't. We asked had anything put in there. Had he put any finger in or any other things. She said that nothing had been pushed into her. And we encouraged her to identify her anatomy a little bit more so we knew what we were talking about.

Q. Okay.

A. Then asked her a lot of these questions were asked very slowly to make sure that she understood what we were talking about. And, you know, case was such she just said that only that he placed his mouth over her external genitalia and just pointed in that general region. We asked whether she had had to touch him anywhere. Whether she had to place her mouth or anything on any of his parts. And she said that she had not.

(Vol. VI, R. 49-51)

C. The Subsequent Trial Proceedings

Following the prosecutor's decision not to call S.G. as a witness, the defense moved for a mistrial. (J.A. 14) The motion was denied. (J.A. 15)

The prosecution rested. (Vol. VII, R. 17)

Defense counsel moved for a directed verdict, stating:

> There is an utter lack of any physical evidence of sexual abuse case [sic].
>
> It is incumbent that the proof be corroborated or be clear and convincing. Here of course we've have [sic] no testimony whatsoever of the alleged victim in this cause. We have had a number of other people testify as to what she supposedly told them. However, again it's been uncorroborated.
>
> (J.A. 16)

The motion was denied. (J.A. 17)

The jury found the petitioner guilty of the offenses charged. (Vol. VII, R. 65)

The defendant filed for a new trial, alleging in pertinent part, as follows:

> The court erred in admitting the following evidence offered by the State over objections by the defendant:
>
> (a) Testimony by the witness Tony DeVore as to matters allegedly stated to her by the purported victim.
>
> (b) Testimony of witness Dr. Michael Meinzen as to matter allegedly stated to him by the purported victim.
>
> (c) Testimony by the witness Tammy Grigsby as to statements allegedly made to her by the purported victim in this cause.
>
> (d) Testimony of witness Officer Terry Lewis as to statements made to him by the alleged victim in this cause.

(e) Testimony by witness Cheryl Reents as to statements allegedly made to her by the purported victim in this cause.

* * * *

That it was error for the Court to deny Defendant's motion for mistrial.

(C. 64-65)

The motion was denied. (C. 4)

The defendant was sentenced to terms of ten years imprisonment for aggravated criminal sexual assault, six years imprisonment for residential burglary, and two years imprisonment for unlawful restraint. (C. 115) The sentences were ordered to run concurrently. (C. 116)

SUMMARY OF ARGUMENT

The defendant's convictions were premised upon the out-of-court declarations of a child. Although the five-year-old complaining witness was present in the courtroom, she did not testify and there was no showing that she was unavailable. In upholding the defendant's convictions over a Confrontation Clause challenge, the Illinois Appellate Court held that the question of "[w]hether the out-of-court declarant is unavailable is totally irrelevant to the determination of whether an out-of-court statement is admissible under an exception or exemption to the hearsay rule." (J.A. 42)

The Illinois Appellate Court's ruling unnecessarily and and impermissibly dispenses with the defendant's Sixth Amendment right to confront his accuser. In *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), the Court set forth the general rule that "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable." The unavailability doctrine reflects a "rule of necessity." *Ohio v. Roberts*, 448 U.S. at 65. It recognizes that the right of confrontation is not absolute, yet

expresses a preference that the criminal defendant be given an opportunity to confront his accuser, if at all possible.

This Court has applied the *Roberts* approach to procedures that shield child witnesses from face-to-face confrontation at trial. *See Coy v. Iowa*, 487 U.S. 1012 (1988) (partition placed between child witness and defendant); *Maryland v. Craig*, 497 U.S. ——, 111 L. Ed. 2d 666 (1990) (child witness permitted to testify via closed-circuit television). In *Coy*, 487 U.S. at 1021, the Court suggested that any infringement upon the right of confrontation would be allowed "only where necessary to further an important public policy." Thereafter, in *Craig*, 111 L. Ed. 2d at 686, the Court held that such a procedure should be employed only "where necessary to further the importnat state interest in preventing trauma to child witnesses in child abuse cases." Accordingly, the prosecution must make "an adequate showing of necessity" and the trial court must find the "procedure is necessary to protect the welfare of the particular child witness who seeks to testify." *Maryland v. Craig*, 111 L. Ed. 2d at 685,

Like the procedures employed in *Coy* and *Craig*, the use of hearsay testimony shields the child witness from the trauma of testifying. In fact, the prejudice to the defendant's confrontation right is much more severe where the prosecution relies solely upon hearsay testimony since the declarant is never required to submit to cross-examination. Since the rule of necessity is applicable to procedures that merely infringe upon the confrontation right, it should certainly apply to a procedure that dispenses with the confrontation right altogether.

Therefore, the defendant's right to confront his accuser in child abuse cases should be dispensed with only where necessary to further the state's importnat interest in the physical and psychological well-being of the child witness. Prior to resorting to the use of hearsay testimony

as a means of shielding the child witness from confrontation, the prosecution must make an adequate showing of necessity and the court must find that the witness is unavailable to testify. If that finding is made, appropriate protective measures must then be tailored to limit the confrontation right as little as feasible. Since the exclusive reliance upon hearsay testimony abrogates the confrontation right entirely, the trial court must explore alternative, less restrictive means of impinging on the defendant's confrontation right. For example, if a child will not suffer severe emotional trauma when testifying via closed-circuit television, that procedure should be followed.

In this case, the prosecution did not make a showing of necessity and the trial court did not find that the child witness was unavailable to testify. Under these circumstances, the prosecution's reliance upon hearsay testimony violated the defendant's Sixth Amendment right to confront his accuser.

ARGUMENT

THE CONFRONTATION CLAUSE REQUIRES THAT THE HEARSAY STATEMENTS OF A NON-TESTIFYING COMPLAINING WITNESS IN A SEXUAL ABUSE PROSECUTION SHOULD BE ADMITTED AGAINST THE ACCUSED ONLY UPON A CASE-SPECIFIC FINDING OF NECESSITY: THE TRIAL COURT SHOULD HEAR EVIDENCE AND DETERMINE IF THE CHILD IS UNAVAILABLE TO TESTIFY.

The Confrontation Clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, provides that a criminal defendant has the right "to be confronted with the witnesses against him." U.S. CONST., amends. VI, XIV; *Pointer v. Texas*, 380 U.S. 400 (1965). This provision conflicts with the admission of hearsay testimony against a criminal defendant

at trial because the defense lacks the opportunity to confront and cross-examine the absent declarant. In *Ohio v. Roberts*, 448 U.S. 56 (1980), this Court considered the competing interests of a criminal defendant's right to confront his accuser and the prosecutorial need for admitting relevant evidence through the use of hearsay exceptions. Summarizing a near-century of jurisprudence, reflected by Supreme Court cases decided over the years, the Court stated that "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable." *Ohio v. Roberts*, 448 U.S. at 66.

The *Roberts* unavailability doctrine reflects a "rule of necessity." *Ohio v. Roberts*, 448 U.S. at 65. It recognizes that the right of confrontation is not absolute, yet expresses a preference that the criminal defendant be given an opportunity to confront his accuser, if at all possible.

The defendant's convictions in this case were premised upon the out-of-court declarations of a non-testifying complaining witness. On appeal, the defendant contended that he had been denied his Sixth Amendment right to confront his accuser since the unavailability requirement of *Roberts* had not been satisfied. In rejecting the defendant's contention, the Illinois Appellate Court dismissed the *Roberts* approach as "the 'Sistine Chapel' of *obiter dicta*" and concluded that:

> Whether an out-of-court declarant is unavailable is totally irrelevant to the determination of whether an out-of-court statement is admissible under an exception or exemption to the hearsay rule.[2]
>
> (J.A. 42)

[2] The Illinois Appellate Court noted that "[t]he only exception to this holding is the factual situation present in *Roberts*, *i.e.*, the use at trial of the previous testimony of a witness who is not longer available." (J.A. 42)

The Illinois Appellate Court's ruling violates the Sixth Amendment by effectively reducing the Confrontation Clause to a rule of evidence. The recent decisions of this Court have reiterated the rule that a defendant's right to confront his accuser may be dispensed with only where "necessary to further an important state interest." *Maryland v. Craig*, 497 U.S. ——, 111 L. Ed. 2d 666, 682 (1990). The application of the necessity doctrine to child abuse cases properly balances the state's legitimate interest in protecting the welfare of the child with the defendant's constitutional right to confront his accuser. Since the defendant's constitutional right to confront his accuser should only be dispensed with where necessary to further the state's legitimate interest in the welfare of the child witness, it is clear that the Illinois Appellate Court's decision fails to pass constitutional muster.

A. The Illinois Appellate Court Erred By Equating The Confrontation Clause With The Rule Against Hearsay.

If, as the Illinois Appellate Court held, the unavailability of the declarant is completely irrelevant to the admission of hearsay testimony, the requirements of the Confrontation Clause would be satisfied whenever the out-of-court statement falls within an exception to the hearsay rule.[3] Thus, the Illinois Appellate Court's decision essentially equates the Confrontation Clause guarantee with the hearsay rule. However, the hearsay exceptions are merely rules of evidence; they do not mark the boundary of the Confrontation Clause. This Court has cautioned that while "hearsay rules and the Confrontation Clause are designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules against hearsay." *Dutton v. Evans*, 400 U.S. 74, 81 (1970) (citations and footnotes omitted).

[3] The Illinois Appellate Court did not make any distinction between statutory hearsay exceptions and firmly rooted common law exceptions to the hearsay rule, nor did the Appellate Court require that the hearsay statements possess any particular indicia of reliability. In fact, the Appellate Court upheld the admission of a number of hearsay statements pursuant to a "liberal" interpretation of an Illinois statute exempting statements made to medical personnel from the hearsay rule. (J.A. 35-39) The Illinois Appellate Court's holding is, therefore, in direct conflict with this Court's recent decision in *Idaho v. Wright*, 497 U.S. ——, 111 L.Ed.2d 638, 654 (1990) (holding that hearsay statements made to a physician, admitted pursuant to a statutory exception to the hearsay rule, violated the Confrontation Clause since the exception was not "firmly rooted" and the prosecution failed to establish that the statements possessed sufficient "particularized guarantees of trustworthiness").

In contrast to the rule against hearsay, the right of confrontation is "basically a trial right." *Barber v. Page*, 390 U.S. 719, 725 (1968). "It includes both the right to cross-examine and the occasion for the jury to weigh the demeanor of the witness." *Barber v. Page*, 390 U.S. at 725. The Confrontation Clause thus assures the accused the right to the adversarial testing of the prosecution's evidence. As this Court recently stated:

> The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.
>
> *Maryland v. Craig*, 111 L.Ed.2d at 678.

This means of testing accuracy is so important that the absence of proper confrontation at trial "calls into question the ultimate 'integrity of the fact-finding process.'" *Chambers v. Mississippi*, 410 U.S. 274, 295 (1973), quoting *Berger v. California*, 393 U.S. 314, 315 (1969).

The Illinois Appellate Court's ruling needlessly dispenses with adversarial testing and allows the prosecution to build a case consisting entirely of hearsay testimony while shielding the complaining witness from cross-examination. Such a procedure permits the prosecution

to "subvert the confrontation right by putting on witnesses who know nothing except what an absent declarant said." *Maryland v. Craig*, 111 L. Ed. 2d at 691 (Scalia, J., dissenting). As Wigmore has noted:

> A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he entrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author . . .
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> 5 Wigmore, Evidence, § 1364 at p. 6, n. 3 (Chadbourn rev. 1974), quoting *Coleman v. Southwick*, 9 John. 50 (N.Y. 1812).

1. United States v. Inadi *Is An Exception To, Rather Than A Repudiation Of, The Unavailability Doctrine Of* Roberts.

The Illinois Appellate Court's ruling was premised upon an interpretation of *United States v. Inadi*, 475 U.S. 387 (1986). The precise holding of *Inadi* was that no unavailability showing is required when statements are admitted pursuant to the co-conspirator exception to the hearsay rule, *i.e.*, co-conspirator statements made during the course and in furtherance of the conspiracy. In so holding, the Court stated:

> *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the Government without a showing that the declarant is unavailable.
>
> *Inadi*, at 393-94.

Emphasizing the language quoted above, the Illinois Appellate Court concluded that the *Inadi* decision "repudiated" the unavailability doctrine of *Roberts*.

It is difficult to reconcile the Illinois Appellate Court's conclusion with the language of *Roberts*.[4] In *Roberts*, the Court set forth a "general approach" that "normally requires a showing of unavailability," but also recognized that competing interests such as "public policy and the necessities of the case" may warrant dispensing with confrontation at trial. Consequently, it is apparent that *Inadi* is not necessarily inconsistent with the general rule of unavailability enunciated in *Roberts*. *See Maryland v. Craig*, 111 L. Ed. 2d at 691 (Scalia, J., dissenting) (describing *Inadi* as an "exception to the general rule of unavailability"); *Nelson v. Farrey*, 874 F.2d 1222, 1231 (7th Cir. 1989) (Flaum, J., concurring) (. . . "*Inadi* merely reaffirms and applies the principle that a showing of unavailability is not required in all situations.").

In fact, less than two weeks after the release of the Illinois Appellate Court's decision in this case, the *Roberts* approach was reiterated in *Idaho v. Wright*, 497 U.S. ——, 111 L. Ed. 2d 638 (1990). The Court stated:

> In *Ohio v. Roberts*, we set forth "a general approach" for determining when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause. We noted that the Confrontation Clause "operates in two separate ways to restrict the range of admissible hearsay."

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[4] The Illinois Appellate Court retreated somewhat from its "clear and emphatic" renunciation of the *Roberts* doctrine (J.A. 42), following this Court's subsequent decision in *Idaho v. Wright*, 497 U.S. ——, 111 L.Ed.2d 638 (1990) (applying the "*Roberts* approach" to the admission of hearsay testimony from a non-testifying child declarant in a sexual abuse case). *See People v. Coleman*, 205 Ill.App.3d 567, 563 N.E.2d 1010, 1020 (4th Dist. 1990) (finding it unnecessary to decide "[to] what extent the *Wright* opinion, by its strong reliance on *Roberts* and the analysis contained therein, reinvigorates the requirement that the witness is unavailable . . .").

"First, in conformance with the Framers' preference for face-to-face accusations, the Sixth Amendment establishes a rule of necessity. In the usual case . . ., the prosecution must either produce or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."

Second, once a witness is shown to be unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."

Idaho v. Wright, 111 L.Ed.2d at 651-52, quoting *Ohio v. Roberts*, 448 U.S. at 65-66.[5]

2. *The Rationale That Prompted This Court To Except The Admission Of Co-Conspirator Statements From The General Rule Of Unavailability Is Not Applicable To The Out-Of-Court Statements Of Complaining Witnesses.*

In concluding that the unavailability requirement is not applicable to the statements of co-conspirators, the *Inadi* Court focused on the special relationship between conspirators. Noting that the relationship between co-conspirators will have changed substantially between the time it was formed and the time of trial, the Court stated:

> Conspirators are likely to speak differently when talking to each other in furtherance of their own illegal aims than when testifying on the witness stand.
>
> *United States v. Inadi*, 475 U.S. at 395.

[5] Since the trial court in *Wright* found that the child witness was incapable of communicating with the jury, the case did "not raise the question of whether, before a child's out-of-court statements are admitted, the Confrontation Clause requires the prosecution to show that a child witness is unavailable at trial and, if so, what that showing requires." *Idaho v. Wright*, 111 L.Ed.2d at 652.

Since the declarant and the defendant will have changed from partners in crime to suspects in a criminal prosecution, the declarant "has little incentive to aid the prosecution" and will have a motive for testifying falsely about the statements in view of the specter of imminent indictment. *United States v. Inadi*, 475 U.S. at 395.

The relationship between the accused and his accuser, however, is entirely different from the relationship between co-conspirators. Unlike co-conspirators, who are partners in crime, the complaining witness and the defendant are involved in a continuing adversarial relationship. Unlike co-conspirators, who may be difficult to locate, the complaining witness is uniquely accessible to the prosecution. Unlike a co-conspirator, who is not necessarily an adverse witness, the complaining witness is the defendant's primary accuser.

Significantly, the particular vice that gave rise to the Confrontation Clause was the practice of trying defendants on "evidence" consisting solely of *ex parte* affidavits or depositions secured by examining magistrates, thus denying the defendant an opportunity to cross-examine his accuser, under oath, and before the trier of fact. *California v. Green*, 399 U.S. 149, 156 (1970). Since the Confrontation Clause was intended to prevent trials by anonymous accusers and absentee witnesses (*California v. Green*, 399 U.S. at 179), it is apparent that the Framers contemplated that an available complaining witness would be called to the stand and examined by the prosecution in open court, and that the witness would be cross-examined by the defense. As this Court stated in *Lee v. Illinois*, 476 U.S. 530, 540 (1986):

> [T]he Constitution provides certain safeguards to promote to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial.

B. The Necessity Doctrine Is Applicable To The Admission Of Hearsay Statements From A Non-Testifying Complaining Witness In Child Abuse Prosecutions.

The "rule of necessity" enunciated in *Roberts* reflects the Confrontation Clause preference that an accused be given an opportunity to confront his accuser, if at all possible. *Roberts*, 448 N.E.2d at 65. Recently, this Court applied the necessity doctrine to certain procedures that shield child witnesses from face-to-face confrontation in sexual abuse cases. The Court held that such an infringement upon the defendant's confrontation right may be allowed only where the "procedure is necessary to protect the welfare of the particular witness who seeks to testify." *Craig* at 685.

The necessity doctrine should also apply to the use of hearsay testimony for the purpose of shielding a child complaining witness from testifying. The use of hearsay testimony not only infringes upon the defendant's confrontation right, it abrogates the right entirely by dispensing with cross-examination. The application of the rule of necessity under these circumstances would tend to preserve the adversary nature of the trial, while promoting the state's interest in the well-being of the child.

1. Coy v. Iowa *and* Maryland v. Craig *Establish That Any Significant Impairment Of The Defendant's Right To Confront His Accuser In Child Abuse Prosecutions Will Be Allowed Only Where The Denial Of Such Confrontation Is Necessary To Protect The Welfare Of The Child.*

In *Coy v. Iowa*, 487 U.S. 1012 (1988), this Court held that the placement of a screen that prevented two child witnesses in a child abuse case from seeing the defendant as they testified against him at trial violated the defendant's Sixth Amendment right to confront his accusers. The Court struck down the procedure because it lacked the "core" confrontation right of an accused to physically face the witnesses against him. *Coy v. Iowa* 487 U.S. at 1017. Citing *Ohio v. Roberts*, this Court suggested that

any exception to the right would be allowed only where "necessary to further an important public policy." *Coy v. Iowa*, 487 U.S. at 1021.

Coy was followed by *Maryland v. Craig*, 497 U.S. ——, 111 L.Ed.2d 666 (1990), wherein this Court reviewed a procedure that permitted the use of closed-circuit television for the receipt of testimony by a child witness in child abuse cases. The Court recognized that "a state's interest in the physical and psychological well-being of child may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Maryland v. Craig*, 111 L.Ed.2d at 685.

The Court cautioned, however, that such a procedure should be employed only "where necessary to further the important state interest in preventing trauma to child witnesses in child abuse cases." *Maryland v. Craig*, 111 L.Ed.2d at 686. Accordingly, the prosecution must make "an adequate showing of necessity" and the trial court must find that: (1) the "procedure is necessary to protect the welfare of the particular child witness who seeks to testify;" (2) "the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant," and (3) "the emotional distress suffered by the child witness in the presence of the defendant is more than mere nervousness or excitement or some reluctance to testify." *Maryland v. Craig*, 111 L.Ed.2d at 685 (citation omitted).

2. *The Application Of The Necessity Doctrine To The Admission Of The Hearsay Statements Of Non-Testifying Complaining Witnesses In Child Abuse Cases Properly Balances The State's Legitimate Interest In Protecting The Welfare Of The Child Witness With The Defendant's Constitutional Right To Confront His Accuser.*

Like the procedures employed in *Coy* and *Craig*, the use of hearsay testimony shields the child witness from the trauma of testifying. However, unlike the procedures in

Coy and *Craig*, which merely infringe upon the defendant's confrontation right by dispensing with face-to-face presence, the reliance upon hearsay testimony completely abrogates the confrontation right by dispensing with cross-examination as well.

It is clear, therefore, that the prejudice to the defendant's confrontation right is much more severe where the prosecution relies solely upon hearsay testimony as opposed to closed-circuit television. Although face-to-face presence is a "core" component of the Confrontation Clause, it is not the "sine qua non of the confrontation right." *Maryland v. Craig*, 111 L.Ed.2d at 679. "The main and essential purpose of confrontation is to *secure for the opponent the opportunity of cross-examination.*" *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974), quoting 5 Wigmore, Evidence, § 1395, p. 123 (3d ed. 1940). (Emphasis in original).

The Confrontation Clause also ensures that a witness will give his statements under oath and permits the jury to observe the demeanor of the witness in making his statements. In applying the necessity doctrine to the admission of closed-circuit testimony in *Craig*, this Court noted that although the procedure denies a defendant face-to-face confrontation, "the presence of [the] other elements of confrontation—oath, cross-examination, and observation of the witness' demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." *Maryland v. Craig*, 111 L.Ed.2d at 682, quoting *Coy v. Iowa*, 487 U.S. at 1020.

Since the rule of necessity is applicable to the admission of a child's testimony via closed-circuit television, it should also apply to the use of hearsay testimony. While closed-circuit television infringes on the defendant's confrontation right by excusing face-to-face presence, the use of hearsay testimony dispenses with the right of confrontation entirely: the complaining witness never testifies under oath; the jury does not have the opportunity to observe her demeanor while making the statements; and, most significantly, the defendant is never given an opportunity to cross-examine his accuser.

Therefore, the defendant's right to confront his accuser in child abuse cases should be dispensed with only where necessary to further the state's important interest in the physical and psychological well-being of the child witness. The prosecution must make an adequate showing of necessity and the court must find that the witness is unavailable to testify. If that finding is made, appropriate protective measures must then be tailored to limit the confrontation right as little as feasible. Since the exclusive reliance upon hearsay testimony abrogates the confrontation right entirely, the trial court must explore alternative, less restrictive means of impinging on the defendant's confrontation right. For example, if a child will not suffer severe emotional trauma when testifying via closed-circuit television, that procedure should be followed.[6]

C. The Application Of The Rule Of Necessity To This Case Requires That The Defendant Be Granted A New Trial.

At the defendant's jury trial, the prosecution introduced the complainant's out-of-court declarations through the testimony of five witnesses: babysitter, mother, police officer, doctor and nurse. This hearsay testimony was admitted over defense objection. The hearsay testimony of the first three witnesses was admitted under the spontaneous declaration exception to the hearsay rule.[7] The

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[6] Section 106A-3 of the Illinois Code of Criminal Procedure authorizes the closed-circuit viewing of a child's testimony. Ill.Rev. Stat., 1987, Ch. 38, § 106A-3.

[7] The prosecution apparently elected to proceed under the common law exception rather than the statutory hearsay exception applicable

testimony of the latter two witnesses was introduced pursuant to an Illinois statute that permits the admission of statements made to medical personnel as an exception to the hearsay rule. *See* Ill.Rev.Stat., 1987, Ch. 38, § 115-13.

Following the admission of the hearsay testimony from these five witnesses, the prosecution called the complaining witness. The complainant did not take the stand. After subsequently indicating that he would attempt to recall the complainant, the prosecutor decided not to put her on the stand.

In moving for a mistrial, defense counsel noted for the record that the complaining witness did not testify "allegedly because of emotional hiatus of some sort." (J.A. 14) Defense counsel argued, in part, that the complainant's "failure to testify" was "prejudicial and operated to deprive [the defendant] of a fair trial." (J.A. 14) The motion was denied.

It is possible under the facts of this case that the prosecutor determined that the complainant did not want to testify or that she was unable to testify due to her emotional condition. However, a witness should not be declared "unavailable" simply because a prosecutor concludes that the witness might not want to testify. The prosecution must make an adequate showing of necessity and the court must find that the witness is in fact unavailable. *Maryland v. Craig*, 111 L.Ed.2d at 685. The finding of necessity must be based on something more than "mere nervousness or excitement or some reluctance to testify." *Maryland v. Craig*, 111 L.Ed.2d at 685.

The defendant's convictions in this case were premised primarily upon the out-of-court statements of the complaining witness. The declarant was not produced for

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to sexual acts on a child under 13. *See* Ill.Rev.Stat., 1987, Ch. 38, § 115-10. The statutory exception requires that the child must either testify at trial or be "unavailable as a witness."

cross-examination, the prosecution did not establish that she was unavailable, and the trial court made no case-specific finding of necessity. For these reasons, the use of the hearsay statements of the non-testifying complaining witness violated the Confrontation Clause and requires that the defendant be granted a new trial.

CONCLUSION

The Illinois Appellate Court violated the dictates of the Confrontation Clause by holding that the question of "[w]hether an out-of-court declarant is unavailable is totally irrelevant to the determination of whether an out-of-court declarant is admissible under an exception or exemption to the hearsay rule." (J.A. 42) As Justice Harlan once cautioned:

> There is no reason in fairness why a State should not, as long as it retains a traditional adversarial trial, produce a witness and afford the accused an opportunity to cross-examine him when he can be made available.
>
> *California v. Green*, 399 U.S. 149, 187 (1970) (Harlan, J., concurring).

Accordingly, the decision of the Illinois Appellate Court should be reversed.

In addition, the defendant's convictions should be reversed and this cause remanded for a new trial. The prosecution's case against the accused was premised primarily upon the out-of-court statements of the non-testifying complaining witness. The prosecution made no showing of necessity and there was no finding that the complainant was unavailable. Under these circumstances, the prosecution's reliance upon hearsay testimony violated the defendant's Sixth Amendment right to confront his accuser.

Respectfully submitted,

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